

Durable Power of Attorney



What is a “Durable” Power of Attorney?

Many people are unaware that an ordinary power of attorney is revoked, and the agent’s power to act for the principal automatically stops, if the principal becomes incapacitated.

Under Missouri law, and the law of many other states, a power of attorney with proper wording may be made “durable.” This means that the power of the agent to act on the principal’s behalf continues despite the principal’s incapacity, whether or not a court decrees the principal to be incapacitated.

Through a durable power of attorney, an agent may continue to act on your behalf even after you have had a stroke or other incapacitating illness or accident. If the power of attorney so provides, the agent can use your funds to pay your bills, can contract for nursing home services for your benefit, and can make basic health care decisions for you.

An aging parent may wish to give a durable power of attorney to a responsible adult child so that the child can act on the parent's behalf and carry on routine matters in the event the parent is disabled or incapacitated. In many instances, this arrangement is far better than making the child the joint owner of the parent's bank accounts and other property and assets.

To create a durable power of attorney in Missouri, the document must state: "This is a durable power of attorney and the authority of my attorney-in-fact shall not terminate if I become disabled or incapacitated or in the event of later uncertainty as to whether I am dead or alive." In many other states, the document must state in substance that "this power of attorney shall not be affected by subsequent disability or incapacity."

It is possible to create a durable power of attorney so that it will only go into effect when the principal is incapacitated or when some other stipulated event or condition occurs. This is ordinarily called a springing durable power of attorney.

Revocation of Durable Power of Attorney

The death of the principal revokes even a durable power of attorney, except for a third person relying on the power of attorney who does not know of the death. Also, a durable power of attorney may be revoked by the principal at any time, either orally or in writing. It is recommended that, when possible, the revocation be written.

Powers Granted by General Powers of Attorney

Prior to 1989, a valid power of attorney had to spell out in detail all of the authorizations granted to the agent. However, under a new Missouri law adopted in August 1989, it is possible to have a "general" power of attorney which authorizes the agent to act for the principal on every kind of subject or matter which may legally be handled through an agent, with certain specific exceptions mentioned below. However, it is still recommended that the power of attorney include as much detail as possible.

Powers Which Must Be Specifically Listed

In Missouri, certain powers must be specifically stated in the power of attorney in order for the attorney-in-fact to be authorized to perform such acts. Those powers

are:

To execute, amend or revoke any trust agreement;

To fund with the principal's assets any trust not created by the principal;

To make or revoke a gift of the principal's property in trust or otherwise;

To disclaim a gift or devise of property to or for the benefit of the principal;

To create or change survivorship interests in the principal's property or in property in which the principal may have an interest; provided, however, that the inclusion of the authority set out in this paragraph shall not be necessary in order to grant to an attorney-in-fact acting under a power of attorney granting general powers with respect to all lawful subjects and purposes the authority to withdraw funds or other property from any account, contract or other similar arrangement held in the names of the principal and one or more other persons with any financial institution, brokerage company or other depository to the same extent that the principal would be authorized to do if the principal were present, not disabled or incapacitated, and seeking to act in the principal's own behalf;

To designate or change the designation of beneficiaries to receive any property, benefit or contract right on the principal's death;

To give or withhold consent to an autopsy or postmortem examination;

To make a gift of, or decline to make a gift of, the principal's body parts under the Uniform Anatomical Gift Act;

To nominate a guardian or conservator for the principal; and if so stated in the power of attorney, the attorney-in-fact may nominate himself as such;

To give consent to or prohibit any type of health care, medical care, treatment or procedure; or

To designate one or more substitute or successor or additional attorneys-in-fact.

Powers Which May Not Be Granted by a Power of Attorney

No power of attorney governed by the Missouri law may grant power to an agent to carry out any of the following actions for the principal:

To make, publish, declare, amend or revoke a will for the principal;

To make, execute, modify or revoke a living will declaration for the principal;

To require the principal, against his or her will, to take any action or to refrain from taking any action; or

To carry out any actions specifically forbidden by the principal while not under any disability or incapacity.

Must I Sign a Power, and If I Do, Will It Be Followed?

No person can be forced to sign a power of attorney, especially one for health care decisions, which cannot be required for admission to a hospital. Once created, your directions must be followed. If a physician or other health care provider declines to follow your instructions due to religious beliefs or moral convictions, such health care provider must transfer the care of the patient to another physician or facility that will honor the patient's instructions. For this reason, it is always advisable to discuss these issues with your physician in advance of any hospitalization or extensive treatment.

Caution in Preparing and Granting Powers of Attorney

A durable power of attorney, and especially a springing durable power of attorney, needs to be very carefully worded and you should seek the assistance of a Missouri lawyer who practices in this area. Furthermore, you should use great care in the selection of your attorney-in-fact.

Remember, you are trusting not only your property, but perhaps your life, to the person you appoint.

An effective durable power of attorney should contain broad and detailed powers that financial institutions can identify and specifically rely on in granting the attorney-in-fact access and control of the principal's assets.

The attorney-in- fact should have the ability under the document to conduct every financial affair the principal may have had in order to correct any and all issues which may arise in the principal's estate.

Although Missouri law sets no limits on the duration of a DPOA, the best practice would be to maintain “fresh” documents that coordinate with other areas of the law and are up-to-date with current financial transactions.

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